

Pham (Migration) [2024] AATA 125 (23 January 2024)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Thi Anh Thi Pham

REPRESENTATIVE: Mr Linh Sy Ho (MARN: 0954932)

CASE NUMBER: 1905964

HOME AFFAIRS REFERENCE(S): BCC2017/4820777

MEMBER: Kira Raif

DATE: 23 January 2024

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2)(a) of Schedule 2 to the Regulations; and
- cl. 820.221(1)(a) of Schedule 2 to the Regulations

Statement made on 23 January 2024 at 4:11pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – detailed and consistent oral evidence and substantial documentary evidence about current circumstances – several inconsistencies and deficiencies about past circumstances – adverse information of contrived relationship and payment for sponsorship denied – length of relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221(1)(a)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant is a national of Vietnam, born in January 1996. She applied for the visa on 16 December 2017 on the basis of her relationship with her sponsor. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
3. The applicant appeared before the Tribunal on 23 January 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, the sponsor's father and the applicant's cousin. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The applicant was represented in relation to the review. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

4. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
5. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
6. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3). Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

7. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided with her application evidence that her marriage with the sponsor was registered in Australia in October 2017. There is nothing to suggest the marriage is not valid. The Tribunal is satisfied the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

8. The couple claim to have first met in November 2016 when the applicant was helping her cousin with renovations and the sponsor was one of the tradesmen and they chatted. They claim to have met again at a New Year party and became attracted to each other and gradually developed feelings. On Australia Day 2017 they decided to become boyfriend and girlfriend. They socialised together and around March 2017 told their parents about their relationship as they saw the relationship as a serious, long term and committed one. In May 2017 the sponsor disclosed his criminal convictions and they grew deeper in understanding and trust. On 20 August 2017 the sponsor proposed to the applicant in front of a close friend and the applicant agreed. They married on 22 October 2017 in the presence of family and friends. In their multiple submissions to the delegate and the Tribunal the applicant and sponsor provided statements about their relationship and, in their declarations to the Tribunal they addressed the concerns raised in the primary decision.
9. The Tribunal has had the benefit of the parties' oral evidence and found their evidence to be consistent. They provided detailed information about their daily affairs, routines, financial and residential arrangements. There is also a substantial amount of documentary evidence addressing different aspects of the relationship that was not before the delegate. The Tribunal has given this evidence due regard.
10. The Tribunal acknowledges several inconsistencies and deficiencies in evidence, that are set out in the primary decision record. While some of these have been explained satisfactorily by the applicant and sponsor, others remain of considerable concern to the Tribunal. For example,
 - a. The applicant told the Tribunal that she and the sponsor did live together in Vietnam during the February 2018 visit and were only separated for two days when visiting their families. She could not offer a reasonable explanation why there were text messages between them for a nine day period from 30 January to 9 February 2018 which might suggest that they did not live together.
 - b. The applicant explained that she gave a wrong address on her IPC in February 2018 because she was not yet familiar with her new address and was tired after a long flight. It is not clear to the Tribunal why the applicant would not be able to recollect her new address after nearly five months of residence there. The IPC suggests that either the parties did not live together as claimed from the time of the marriage, or that the applicant provided incorrect information to the Department.
 - c. The Tribunal has significant concerns about both names appearing on the receipt for the wedding rings, when the applicant claims she did not pay for the rings, was not present when they were bought and did not contribute to the purchase price. The applicant claims her husband wanted to put both names "for memory". It is not clear to the Tribunal why memory needs to involve a receipt in joint names but in any case, the issue here is with the veracity of the documents presented in support of the application. The receipt was submitted with the application as evidence of joint financial activities or of commitment, no explanation was offered that the receipt contained two names only 'for memory'. That is, the applicant had sought to mislead the delegate by presenting the evidence of a circumstance that did not exist. The appearance of two names on the rings receipt when the rings were clearly not purchased by both parties indicates that there is a willingness to provide inaccurate information and raises concerns about the veracity of other documents.
 - d. The applicant claims that she made a 'mistake' by not mentioning her husband's details in the Vietnamese marriage certificate. The applicant states that she had

reapplied for the police certificate declaring her husband (after the primary refusal) and also declared the relationship to several Australian authorities.

11. The combination of these matters raises serious concerns for the Tribunal about the veracity of the couple's claims. The Tribunal also discussed with the applicant and sponsor the allegation received by the delegate that the relationship was contrived and a payment was made in return for sponsorship. Both the applicant and the sponsor denied the allegation.
12. The Tribunal considers it possible that the relationship was contrived for visa purposes and that the documents presented in support of the application were prepared for the benefit of the application. However, having regard to the wealth of documentary evidence and the consistent and detailed oral evidence, the Tribunal has formed the view, on balance, that the applicant is the spouse of the sponsor.
13. The Tribunal has considered the financial aspects of the relationship. The applicant presented evidence of the couple operating joint accounts since their marriage. These accounts show regular transactions for living expenses. There are joint invoices for shopping and other expenses. The applicant presented evidence of joint rental payments, clubs membership, utility bills and evidence of the couple nominating each other as beneficiaries in their superannuation policies. The Tribunal is satisfied they pool their financial resources. There is limited evidence of any legal obligations owed to the other party or of joint liabilities.
14. In considering the nature of the household, the Tribunal acknowledges that the parties gave consistent evidence about their living arrangements. The Tribunal is satisfied that they live together and share the housework.
15. There is ample photographic evidence before the Tribunal of the couple undertaking joint social activities, joint travel and of their interactions with friends and family. There are statements from friends and family about the relationship and two family members gave oral evidence to the Tribunal expressing the view that the relationship is a genuine one. The Tribunal is also mindful that family members had travelled from Vietnam to attend the couple's wedding and they claim that about 70 attended the wedding in Sydney. The Tribunal also acknowledges that the relationship has been declared to a number of authorities, including the taxation department, real estate agents, utility companies, superannuation companies, etc.
16. The Tribunal accepts that friends and family believe the relationship to be a genuine one. The Tribunal accepts that the couple plan and undertake joint social activities.
17. The relationship has been in existence for a period exceeding six years. The Tribunal is prepared to accept that the couple draw companionship and emotional support from each other and they outlined their plans for the future.
18. As noted above, the Tribunal retains some concerns about the relationship but, on balance, the Tribunal is satisfied that the applicant and sponsor have a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied that they live together. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and the time of this decision. Therefore the applicant meets cl 820.211(2)(a) and cl 820.221(1)(a).

Conclusion

19. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

20. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2)(a) of Schedule 2 to the Regulations; and
 - cl. 820.221(1)(a) of Schedule 2 to the Regulations

Kira Raif
Senior Member